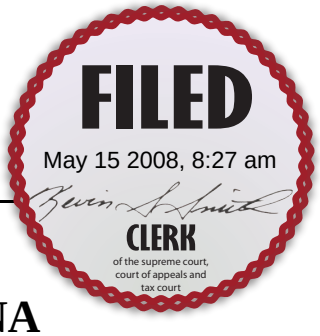
APPELLANT PRO SE:

WILLIAM S. TARKINGTON
Midwest City, Oklahoma



IN THE
COURT OF APPEALS OF INDIANA

WILLIAM S. TARKINGTON,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A03-0712-CV-545
	)	
MOLLY S. TARKINGTON,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
The Honorable Richard L. McCormick, Magistrate
Cause No. 71D01-0707-PO-353

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent William S. Tarkington appeals the protective order entered in favor of appellee-petitioner Molly S. Tarkington, William's ex-wife. William argues that the trial court did not have jurisdiction to enter the order and that there is insufficient evidence supporting the trial court's decision. Finding no error, we affirm.

FACTS

William and Molly were married on February 14, 1997, and their divorce was finalized in Oklahoma on May 17, 2007. Two children were born of the marriage, E.T., who was eight years old at the time of the proceedings herein, and A.T., who was ten years old at the time of the proceedings herein. William and Molly entered into a joint custody plan in their Oklahoma divorce proceeding pursuant to which William had custody of the children for seven weeks during the summer, during spring break, and some alternating holidays, and Molly had custody during the remainder of the year. When the girls are staying with one parent, the other parent is entitled to have reasonable telephone contact with the children during that time. Just before the divorce was finalized, Molly moved to Indiana and William remained in Oklahoma.

Following the finalization of the parties' divorce, the girls remained with William in Oklahoma until the end of July 2007. On July 22, 2007, William called Molly to discuss her visit to Oklahoma to pick up the girls. He wanted to ensure that neither Molly nor her parents, who were to accompany her,

> would say anything out of line. Because if [they] said anything out of line, he didn't know what he was going to do to [them]; that he had already informed his nephew, Chris Tarkington, that if anything was

> said out of line, Chris would have to hold him back and take him to the ground, because he didn't know what he would do to us.

Tr. p. 8. More explicitly, William said, "Chris is f*cking petrified that he's going to have to f*cking take me to the ground if you guys say anything out of line." Id. The phone call made Molly feel "scared to death," and she believed that "he's going to kill me. There's no way he's going to let me live when I go down there. It's an ambush." Id. at 9. She "freaked out" and "didn't go to work the next day, because [she] had stayed up all night long crying." Id. She spoke to William the following day and he did not remember that the conversation had occurred; she instructed him to check his phone log and after he did so, he acknowledged that they had, in fact, spoken the day before. Molly testified that she believes that alcohol plays a "major role" in William's behavior. Id. at 14.

On July 27, 2007, Molly filed a petition for an ex parte order of protection. She based her petition on the July 22 phone call, a June 10, 2006, incident in which a drunk William allegedly sexually and physically assaulted Molly, and a January 7, 2007, incident in which a drunk William threatened to kill Molly and her parents. The ex parte protective order was granted on the same day and was effective until September 10, 2007.

On October 11, 2007, the trial court held a hearing to determine whether a final protective order should be entered. At the hearing, Molly testified about the July 22 phone call. She also testified without objection about instances of physical abuse, sexual assault, and threats of violence that she had experienced at the hands of William during their marriage. William elicited on cross-examination that she had not raised those incidents during their divorce and custody proceedings in Oklahoma. Molly further described, without

objection, the "rude" and "disgusting" text messages that William frequently sends to her. Id. at 15. She testified that William has never hurt or attempted to hurt the children. Molly requested that if William wanted to contact the girls, he use their cell phones, and that if he wanted or needed to contact her, he do so via appropriate e-mails.

On October 23, 2007, the trial court entered a final protective order that is effective until September 10, 2009. The protective order states that William is enjoined "from threatening to commit or committing acts of domestic or family violence" against Molly, "from harassing or annoying" Molly, and "from using or possessing a firearm, ammunition, or deadly weapon."[1] Appellant's App. p. 11-12. The trial court transmitted the protective order to the parties with a letter in which it explained its ruling as follows:

> I have no doubt that [William] threatened [Molly] with violence. There is also no doubt in my mind that [William] has engaged in conduct to harass [Molly] by sending inappropriate text messages. I have narrowly drafted the protective order so as to avoid any conflict with any child custody plan. [William] may engage in legitimate communication under the plan, but he has no a [sic] right to harass or threaten another with violence. Perhaps your clients would be well advised that, even for legitimate communication, it might even be best for the parties to do so in writing to one another or through their respective attorneys.

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[1] The protective order is signed only by Magistrate McCormick. As a general rule, a magistrate may not enter a final appealable order unless sitting as a judge pro tempore or a special judge. Ind. Code § 33-23-5-8; see also I.C. § 33-23-5-9 (providing that in civil proceedings, a magistrate shall report findings following an evidentiary hearing or trial and the court shall enter the final order). There is no evidence in the record here that Magistrate McCormick was sitting as a judge pro tempore or a special judge. St. Joseph County, however, has explicitly provided magistrates with the authority to enter a final order or judgment in any proceeding involving small claims and protective orders to prevent domestic or family violence. Ind. Code § 33-33-71-69(c). In the most recent legislative session, the General Assembly removed this statutory provision. See 2008 Ind. Legis. Serv. P.L. 127-2008. Inasmuch as the amendment does not take effect until July 1, 2008, however, the protective order herein is properly final and appealable even though it was entered by a magistrate.

> Although Ind. Code § 34-26-5-6 suggests that I should transfer this matter to the parties[']divorce court, I find no provisions for interstate transfer of a protective order to the Oklahoma Court. Although [William] cites Ind. Code § 31-21-5 et seq. as authority, same i[s] inapplicable as [Molly] does not seek a modification of custody, nor does [this] Court grant a modification of custody. I am mindful that, even when appropriately transferring a protective order matter to another court, the Court where the petition is filed can issue an ex-parte order of protection for two years. I believe I am to read the Indiana Civil Protection Act broadly to afford relief when necessary.
>
> I have declined to include in the Order any modification for the location of exchange of the children. If the parties need to be told where the exchange is to occur, they can go back to the Oklahoma judge and ask him to modify his Order.

Id. at 8-9. William now appeals.

DISCUSSION AND DECISION

Before delving into the substance of William's arguments, we observe that Molly has not filed an appellee's brief. Where no appellee's brief has been filed, the judgment may be reversed if the appellant's brief presents a prima facie case of error. Van Wieren v. Van Wieren, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006). Prima facie error is "error at first sight, on first appearance, or on the face of it." Id.

I. Jurisdiction

William first argues that the trial court did not have jurisdiction to enter the protective order. He directs our attention to "the firmly established rule that a court that issues a dissolution decree retains exclusive and continuing responsibility for any future modifications and related matters concerning the care, custody, control, and support of any minor children." Fackler v. Powell, 839 N.E.2d 165, 167 (Ind. 2005). Our Supreme Court has also stated that requests to clarify and enforce property settlement agreements must be

made to the dissolution court. Id. Additionally, William directs our attention to Indiana Code section 31-21-5-3, which provides that an Indiana court may not modify a child custody determination made by a court of another state except in very limited circumstances not present herein.

Here, Molly did not seek to modify, clarify, or enforce the parties' child custody agreement. She did not seek to alter William's relationship with their children. And the protective order did not grant such relief. Instead, the trial court fashioned a narrowly-drawn order that affects only the communication between William and Molly. Furthermore, the trial court explicitly stated that William may continue to engage in legitimate communication with Molly pursuant to their joint custody arrangement, though it suggested—but did not require—that such communication occur in writing or through their attorneys. Thus, the protective order in no way modifies or affects the custody agreement entered by the Oklahoma court. Under these circumstances, we find that the trial court properly exercised jurisdiction over this matter.[2]

[2] Additionally, we note that Indiana Code section 34-26-5-6(4) states that if a person who petitions for an ex parte protective order also has a "pending case" involving the respondent or a child of the petitioner and the respondent, "the court that has been petitioned for relief shall immediately consider the ex parte petition and then transfer that matter to the court in which the other case is pending." Inasmuch as the parties' divorce and accompanying custody agreement has been finalized in Oklahoma, we cannot conclude that their case is still "pending" in that state. Moreover, we agree with the trial court herein that even if the divorce case were still pending, there are no provisions for interstate transfer of a protective order. Thus, we do not find that this statute rendered the trial court's exercise of jurisdiction and entry of a final protective order improper.

II. Sufficiency of the Evidence

William next argues that the evidence supporting the entry of the protective order is insufficient. The petitioner for a protective order must prove at least one of the allegations of her petition by a preponderance of the evidence. Tons v. Bley, 815 N.E.2d 508, 511 (Ind. Ct. App. 2004); Ind. Code § 34-26-5-9. In reviewing the sufficiency of the evidence supporting a protective order, we will neither weigh the evidence nor resolve questions of witness credibility. Tons, 815 N.E.2d at 511. We will examine only the probative evidence and reasonable inferences that may be drawn therefrom that support the trial court's judgment. Id. "A finding that domestic or family violence has occurred sufficient to justify the issuance of an order under this section means that a respondent represents a credible threat to the safety of a petitioner . . . ." I.C. § 34-26-5-9(f).

Here, Molly testified that on July 22, 2007, William threatened to commit acts of violence against Molly and her parents. The conversation made her fear for her life. Tr. p. 8-9. She further testified that William repeatedly physically, verbally, and sexually assaulted her during their marriage. See I.C. § 34-26-5-13 (providing that a court may not deny relief solely because of a lapse of time between an act of domestic violence and the filing of the petition). Finally, Molly testified that William has continued to send her text messages that are filled with inappropriate and harassing content. William now argues that the trial court improperly admitted evidence regarding the prior acts and the text messages, but he has waived this argument inasmuch as he failed to object at the time of trial.

The trial court made a credibility determination and concluded that it had "no doubt" that William had threatened Molly with violence and has "engaged in conduct to harass" Molly by sending the text messages. Appellant's App. p. 8. William directs our attention to his own testimony, which offered a different version of events and the parties' history, but this amounts to a request that we reweigh the evidence and second-guess the trial court's credibility determination—a request we decline. We find that the trial court properly concluded that Molly proved that William represents a credible threat to her safety by a preponderance of the evidence and, therefore, properly entered the protective order against William.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.